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In the Supreme Court of the United States

OCTOBER TERM, 1996

NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission correctly determined that it lacks jurisdiction under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, over the natural gas gathering rates charged by a natural gas company's affiliate, when the affiliate performs its gathering services independently of, and at arm's length from, the natural gas company's interstate transportation services.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 106 F.3d 1190. The opinions of the Federal Energy Regulatory Commission (Pet. App. B1-B66, C1-C12) are reported at 72 F.E.R.C. ¶ 61,220 and 73 F.E.R.C. ¶ 61,224.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1997. The petition for a writ of certiorari was filed on May 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 1(b) of the Natural Gas Act of 1938 (NGA or Act), 15 U.S.C. 717(b), states that the provisions of the Act "shall apply to the transportation of natural gas in interstate commerce, * * * the sale in interstate commerce of natural gas for resale, * * * and * * * natural gas companies engaged in such transportation or sale," but not to the "production or gathering of natural gas." "Gathering" is the "process of collecting gas at the point of production (the wellhead) and moving it to a collection point for further movement through a pipeline's principal transmission system." *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1265 (8th Cir.), cert. denied, 502 U.S. 856 (1991). There is no bright-line test for determining whether an activity constitutes interstate transportation, which falls within the jurisdiction of the NGA, or gathering, which does not. The Federal Energy Regulatory Commission (Commission or FERC) makes that determination on a case-by-case basis, applying a "primary function" test. See *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268 (1990).[1]

Sections 4 and 5 of the NGA, 15 U.S.C. 717c, 717d, require the Commission to establish for "natural gas compan[ies]"— *i.e.*, persons or corporations "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas

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[1] The "primary function" test involves consideration of various factors: (1) the length and diameter of the pipelines; (2) the extension of the facility beyond the central point in the field; (3) the pipelines' geographic configuration; (4) the location of compressors and processing plants; (5) the location of wells along all or part of the facility; and (6) the operating pressure of the pipelines. See, *e.g.*, Pet. App. B22-B29.

for resale," 15 U.S.C. 717a(6)—"just and reasonable rates" for, or in connection with, "the transportation or sale of natural gas subject to the jurisdiction of the Commission." 15 U.S.C. 717c(a), 717d(a). Section 4(c) requires natural gas companies to file their rates with the Commission, 15 U.S.C. 717c(c), and Sections 4(e) and 5(a) authorize the Commission to determine the lawfulness of any such rates or changes in rates, 15 U.S.C. 717c(e), 717d(a).

Section 7(c) of the Act, 15 U.S.C. 717f(c), prohibits construction of a facility for "transportation or sale of natural gas, subject to the jurisdiction of the Commission," unless the Commission has issued a "certificate of public convenience and necessity" for that facility. In turn, Section 7(b), 15 U.S.C. 717f(b), prohibits a natural gas company from abandoning "facilities subject to the jurisdiction of the Commission or any service rendered by means of such facilities," unless the Commission has found "that the present or future public convenience or necessity permit such abandonment."

b. Traditionally, interstate pipelines operated primarily as gas merchants, buying gas at the wellhead and selling it either to local distribution companies for resale or directly to end-users. Under that regime, pipelines charged a single "bundled" rate for both the gas sold and its transportation to the purchaser. In regulating the rate that the pipeline could charge for the sale of gas, the Commission had jurisdiction to consider the costs of production or gathering that were embedded in the pipeline's sales rates. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677 (1954); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 601-604 (1945).

In 1992, after implementing a series of orders to foster a more competitive marketplace for natural gas, the Commission issued Order No. 636,[2] which required pipelines to unbundle their sales and transportation rates. Under Order No. 636, a pipeline generally may act only as a transporter once gas has left the production area and entered the pipeline's mainline systems. See 18 C.F.R. 284.8(a)(1), 284.9(a)(1) (1995). Pursuant to its rate authority under Sections 4 and 5 of the Act, the Commission continues to require pipelines that provide gathering services to file their gathering rates. See *Northern Natural*, 929 F.2d at 1265 (Commission has jurisdiction over gathering rates where pipeline itself performs the gathering "in connection with" interstate transportation).[3] In several recent decisions, however, the Commission determined that it lacks jurisdiction over the gathering rates of a pipeline affiliate that operates independently of the pipeline itself and performs no interstate sales or transportation services.[4] The D.C. Circuit recently affirmed

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[2] 57 Fed. Reg. 13,267, on reh'g, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), aff'd in part and remanded in part *sub nom. United Distrib. Cos.* v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1723, 1724 (1997), on remand, Order No. 636-C, 78 F.E.R.C. ¶ 61,186 (1997).

[3] The Eighth Circuit observed in *Northern Natural* that "[p]ermitting a pipeline to manipulate the otherwise unregulated charges for gathering services performed over its own facilities in connection with jurisdictional interstate transportation, would, in effect, permit the *pipeline* to establish rates for the interstate transportation." 929 F.2d at 1270.

[4] See, *e.g.*, *Mid Louisiana Gas Co.*, 67 F.E.R.C. ¶ 61,255, order on reh'g, 69 F.E.R.C. ¶ 61,303 (1994); *Williams Natural Gas Co.*, 67 F.E.R.C. ¶ 61,252 (1994); *Northern Natural Gas*

that determination in *Conoco Inc.* v. *FERC*, 90 F.3d 536 (1996) (affirming *Arkla Gathering Services Co.*, 67 F.E.R.C. ¶ 61,257, on reh'g, 69 F.E.R.C. ¶ 61,280 (1994), on reh'g, 71 F.E.R.C. ¶ 61,297 (1995)), cert. denied, 117 S.Ct. 1017 (1997).

2. El Paso Natural Gas Company (El Paso), an interstate natural gas company, proposed to transfer its natural gas gathering facilities and services to El Paso Field Services Company (El Paso Field), its corporate affiliate, which would then assume responsibility for providing gas gathering services. On January 14, 1994, El Paso sought from the Commission authority under Section 7(b) of the Act to abandon the gas gathering facilities—which, while exempt under Section 1(b), nevertheless had been the subject of a certificate of public convenience under Section 7(c)—and to convey those facilities to El Paso Field, which would then assume responsibility for providing gas gathering services. Petitioners, local natural gas distributors and two state regulatory entities, filed protests with the Commission. They contended, among other things, that the Commission was without authority to disclaim jurisdiction over El Paso Field's gathering rates and services.

The Commission determined that the subject facilities were "gathering facilities" within the meaning of Section 1(b). The Commission further determined that El Paso Field, as a provider of services using those gathering facilities (and as a provider of no other services involving interstate transportation or sales), would not be a "natural gas company" subject to regulation under the NGA so

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Co., 69 F.E.R.C. ¶ 61,264 (1994); *K N Energy, Inc.*, 69 F.E.R.C. ¶ 61,377 (1994).

long as it operates its gathering services independently of, and at arm's length from, El Paso's transportation services.[5] The Commission denied petitioners' request to investigate the extent of competition for gathering services in the relevant geographic areas:

> [T]he existence or absence of competition for gathering in an area is irrelevant to whether or not the Commission will regulate an affiliated gatherer's rates. Under the NGA, the Commission has no authority to regulate a gatherer's rates or its terms and conditions since a gatherer is not a natural gas company.

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[5] To ensure that the relationship remains at arm's length, the Commission directed El Paso to amend its tariff to add the following standards of conduct:

> (a) El Paso will provide nondiscriminatory access to all sources of supply in accordance with Part 284 of the Commission's regulations and will not give shippers of its gathering affiliate undue preference over shippers of nonaffiliated gatherers or other customers in scheduling, transportation, storage or curtailment priority.
>
> (b) El Paso will not condition or tie its agreement to provide transportation service to an agreement by the producer, customer, end-user, or shipper relating to any service by any gathering affiliate, any services by it on behalf of its gathering affiliate, or any services in which its gathering affiliate is involved.

Pet. App. B35. The Commission further directed El Paso to offer gathering-service customers a *pro forma*, or default, contract for gathering services at reasonable rates and terms for a reasonable period of time after transfer of the facilities out of NGA jurisdiction. *Id.* at B17-B18; see also *id.* at B40-B43.

Pet. App. B33. The Commission added, however, that it may disregard corporate form and treat a pipeline and its affiliate as a single entity if the "affiliated gatherer acts in concert with its pipeline affiliate * * * in a manner that frustrates the Commission's effective regulation of the interstate pipeline." *Id.* at B35-B36.

On rehearing, the Commission specifically distinguished its disclaimer of jurisdiction over El Paso Field's gathering rates from its assertion of jurisdiction over the gathering rates charged by the natural gas company in *Northern Natural*. Pet. App. C7-C8. It pointed out that, while *Northern Natural* involved gathering performed directly by a natural gas company "in connection with" the pipeline's jurisdictional transportation services within the meaning of Sections 4 and 5, this case involved gathering to be performed by an affiliate. The Commission explained that a company (such as El Paso Field) "that neither transports natural gas in interstate commerce, nor makes jurisdictional sales, is not a natural-gas company under the NGA, and thus does not * * * provide gathering services in connection with jurisdictional transportation." *Id.* at C7. The Commission again noted its authority to disregard corporate form and to exert control over the gathering activities of an affiliated gatherer in cases involving "abuses arising specifically from the interrelationship between the pipeline and its affiliate." *Id.* at C8, citing *Mid Louisiana Gas Co.*, 67 F.E.R.C. ¶ 61,255, at 61,853 (1994); *Arkla Gathering Services Co., supra.*

3. "[C]hoos[ing] to follow the D.C. Circuit's lead" in *Conoco Inc.* v. *FERC*, 90 F.3d 536 (1996), cert. denied, 117 S. Ct. 1017 (1997) (see Pet. App. A13), the court of appeals affirmed. After first determining

that petitioners have standing to challenge the Commission's decision, see *id.* at A5-A10, the court held that the NGA, which does not explicitly address the question of affiliated gatherers, "allows FERC to treat [El Paso Field] on its own terms and not as a company that provides transportation or sales 'in connection with' jurisdictional activities." *Id.* at A12. Although the court recognized that, as a policy matter, "[t]here is room to question whether the formality of creating a separate corporate entity justifies turning a heavily regulated gathering facility into a facility that is outside of FERC jurisdiction," it agreed with the D.C. Circuit that FERC's interpretation of the NGA "is a permissible interpretation of the statute" and is therefore entitled to judicial deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. A11-A13. Like the D.C. Circuit, the court perceived no conflict between the Commission's position and the Eighth Circuit's decision in *Northern Natural*. That case, the court observed, involved FERC's jurisdiction to regulate the gathering rates not of affiliated gatherers, but of interstate pipelines that were themselves engaged in gathering, a "fact [that] makes all the difference." *Id.* at A11 (citing *Conoco*, 90 F.3d at 541, 547).

The court of appeals also rejected petitioners' challenge to the Commission's "fail[ure] to consider whether competition was sufficient to warrant granting El Paso's abandonment request." Pet App. A12-A13. The court explained that the Commission had taken "steps to maintain competition by requiring open-access and default contracts and threatening to re-assert its jurisdiction if [El Paso Field] should act discriminatorily," and concluded that "[t]he statute

does not require a more specific inquiry into the state of competition." *Id.* at A13 (citing *United Distrib. Cos.* v. *FERC*, 88 F.3d 1105, 1134-1142 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1723, 1724 (1997)).

ARGUMENT

The court of appeals correctly affirmed the Commission's conclusion that its rate jurisdiction under Sections 4 and 5 of the NGA does not extend to gathering services operated by a non-"natural gas company" affiliate of an interstate pipeline, where the gathering services are performed independently of, and at arm's length from, the pipeline's interstate sales and transportation services. This Court recently denied a petition for a writ of certiorari to review the only other court of appeals decision to have addressed that issue, *Conoco Inc.* v. *FERC*, 90 F.3d 536 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1017 (1997) (No. 96-686), and this case is no more worthy of the Court's review.

Petitioners argue (Pet. 11-22) that Section 4 of the NGA requires the Commission to regulate rates for gathering services performed by an interstate pipeline's affiliate, and that the Commission's decision here amounts to *de facto* deregulation of interstate pipeline gathering rates. That argument is without merit. Section 4(a) applies, by its terms, only to "rates and charges * * * received by [a] natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission." 15 U.S.C. 717c(a). Under Section 2(6) of the Act, 15 U.S.C. 717a(6), "'[n]atural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." El

Paso Field performs no interstate transportation or sales, but only gathering services, which Section 1(b) specifically exempts from the Commission's jurisdiction. 15 U.S.C. 717(b) (NGA provisions "shall not apply * * * to the production or gathering of natural gas"). Accordingly, under the plain language of the Act, El Paso Field is not subject to the Commission's rate regulation; in any event, the Commission's interpretation of the Act is plainly reasonable. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Despite petitioners' contrary argument (Pet. 14-16), neither *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 601-604 (1945), nor *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682 (1947), nor *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1265 (8th Cir.), cert. denied, 502 U.S. 856 (1991), involved the Commission's jurisdiction *vel non* to regulate a non-natural gas company, like El Paso Field, that independently performs only gathering services. As the D.C. Circuit recognized in *Conoco*, see 90 F.3d at 545 & n.19, see also Pet. App. A11, those cases involved the quite different issue of the Commission's authority to regulate the reasonableness of rates charged by "natural gas companies" that directly engaged in gathering or production "in connection with" their interstate transportation or sale in interstate commerce for resale.[6]

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[6] In *Colorado Interstate*, the Commission and the Court viewed the companies involved as operating as a single enterprise or integrated system for rate-setting purposes. See 324 U.S. at 585, 596-597. Similarly, in *Interstate Natural Gas*, the pipeline, although an affiliate of another natural gas company, performed both interstate transportation and gathering. See 331 U.S. at 684-686. Finally, although the *Northern Natural*

Thus, in disclaiming jurisdiction over El Paso Field, the Commission has not, as petitioners charge, rewritten this Court's jurisdictional boundaries (Pet. 16) or abdicated its regulatory responsibilities under the NGA (Pet. 22). The Commission has correctly recognized that its jurisdiction is limited to "natural gas companies" as defined by the Act, and that a company, like El Paso Field, "that neither transports natural gas in interstate commerce, nor makes jurisdictional sales, is not a natural-gas company under the NGA." Pet. App. C7. Moreover, the Commission specifically predicated its jurisdictional ruling on El Paso's operation of its jurisdictional services independently of and at arm's length from El Paso Field. If the pipeline and its affiliate violate that standard

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court stated in dictum that the expression "gathering facilities owned by the pipeline" includes "such facilities owned or operated directly or indirectly by a pipeline or its * * * affiliate," 929 F.2d at 1263 n.2, that case involved the Commission's jurisdiction to regulate gathering services performed directly by a natural gas company, and the Eighth Circuit held only that the Commission may regulate the rates a natural gas company itself charges for gathering services performed "in connection with" jurisdictional interstate transportation.

Petitioners' reliance (Pet. 13, 16-17) on *MCI Telecomm. Corp.* v. *AT&T*, 512 U.S. 218 (1994), and *Maislin Indus. U.S.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), is also misplaced. In the former case, this Court held that a provision of the Communications Act permitting the Federal Communications Commission to "modify" a statutory requirement did not permit the FCC to eliminate the requirement altogether; in the latter, the Court held that the "filed rate doctrine" of the Interstate Commerce Act foreclosed the Interstate Commerce Commission's policy of relieving a shipper of the obligation to pay a rate filed with the ICC when the shipper and carrier had privately negotiated a lower rate. Neither of those holdings has relevance to the issue presented here.

and collude so as to effect a jurisdictional service that falls within the Commission's jurisdiction, the Commission is prepared to disregard their separate corporate structures and to treat the pipeline and the gatherer as a single entity. *Id.* at B35-B36. In short, the Commission has carefully tailored its order to ensure that the affiliated status of the pipeline and the gatherer cannot be abused to frustrate the Commission's effective regulation of "the transportation of natural gas in interstate commerce." *Id.* at B35.

Finally, petitioners claim that the Commission's "refusal to consider competition in its grant of abandonment to El Paso" violates its obligation, under Section 7(b) of the NGA,[7] to consider whether "the present or future public convenience or necessity permit[s] such abandonment." Pet. 20. Whether or not the Commission has jurisdiction to consider whether an abandonment is in the public interest when the recipient of abandoned gathering facilities is a nonjurisdictional entity, cf. Pet. App. A12-13, the court of appeals correctly determined that, in this case, the Commission had reasonably met any obligation it might have under Section 7(b) to ensure that the abandonment does in fact serve the public

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[7] Section 7(b) provides:

> No natural-gas company shall abandon all or any portion of its facilities *subject to the jurisdiction of the Commission*, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

15 U.S.C. 717f(b) (emphasis added).

interest. Specifically, the Commission "did consider antitrust problems that could arise from El Paso's spin-off of its gathering facilities and took steps to maintain competition by requiring open access and default contracts and threatening to re-assert its jurisdiction if [El Paso Field] should act discriminatorily." *Id.* at A13. As the court of appeals concluded, "[t]he statute does not require a more specific inquiry into the state of competition." *Ibid.*; see also *Consolidated Edison Co.* v. *FERC*, 823 F.2d 630, 636 (D.C. Cir. 1987) ("[B]y delegating abandonment power in such broad terms, Congress expected that the Commission would develop an appropriate test to fit the regulatory climate.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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